COMMUNICATION

FROM THE

Comptroller of the City of New York

TO THE

Assembly Committee on Cities,

RELATIVE TO

PROPOSED AMENDMENTS

TO THE

GREATER NEW YORK CHARTER

TO REMEDY CERTAIN EVILS, INCLUDING THE PRACTICE OF THE CONFESSION OF JUDGMENTS BY THE CORPORATION COUNSEL.

FEBRUARY 20, 1900.

City of New York,

DEPARTMENT OF FINANCE.

Comptroller's Office.

February 20th, 1900.

To the Committee on Cities of the Assembly:

Gentlemen:—On February 15, 1900, I had the honor of appearing before your Committee in support of two bills introduced by Mr. Fallows to amend, respectively, sections 255 and 149 of the Greater New York Charter. The first bill (Assembly No. 742) affects the powers and duties of the Law Department, and the second (Assembly No. 741) those of the Department of Finance.

It was necessarily impracticable within the brief limits of that hearing to elucidate fully the reasons which make this legislation of vital importance, and I desire, therefore, in this communication to explain why it is of so urgent a character as to render it inadvisable to postpone action by referring the proposed Charter amendments to the Charter Revision Commission which it is proposed to create at this session of the Legislature.

I.

Assembly Bill No. 742.

This bill (See Appendix I) amends Section 255 of the Charter, relating to the Law Department in two particulars:

(*a.*) By requiring the approval of the Board of Estimate and Apportionment before proceedings shall be instituted by the Corporation Counsel to

acquire title to real estate by condemnation proceedings, except for the opening of streets.

(*b.*) By prohibiting the Corporation Counsel from offering judgment in favor of or against the City of New York without the previous written approval of the Comptroller, and in case of a money judgment exceeding $10,000, or relief other than in the nature of a money judgment, by requiring also the approval of the Mayor.

(*a.*) *As to the first mentioned amendment, relating to condemnation proceedings:*

It has been the theory of our municipal government for many years that the control of the City's liabilities, expenditures and obligations should be vested in one central and responsible body—the Board of Estimate and Apportionment. The necessity for some such control is so self-evident as to require no argument.

The money of the taxpayers is almost wholly expended from two sources: (1) from taxation, and (2) from the proceeds of sales of bonds. In the making of the annual budget to be raised by taxation the Board of Estimate and Apportionment is, subject to certain important legislative restrictions, substantially free to determine the amounts of departmental appropriations upon which the annual burden of taxation depends (Charter, Section 226). In the determination of the extent to which the City shall become indebted by the issue of bonds for public improvements the Board of Estimate and Apportionment is also supposed to possess similar powers (*id.*, Sections 48, 169, 174, 181, 184, &c., &c.), although for a few purposes the Commissioners of the Sinking Fund are vested with these powers (*id.*, Sections 169, 180).

As a matter of fact, this theory of law is not realized in practice for the following reasons:

(1.) By far the larger part of the annual budget

is made up of the items of State taxes, Redemption of and Interest on the City debt, and Sinking Fund Installments, which are regulated by statute and necessarily beyond the control of the local authorities, and the salaries of such graded employees as policemen, firemen, school teachers and members of the street cleaning force, whose salaries are fixed by express legislative enactments. It is not my intention to suggest any modification of existing laws on this subject, if, indeed, such modification be in any way practicable.

(2.) In regard to the issue of bonds the Board of Estimate and Apportionment is deprived of its legitimate authority owing to the manner in which the City is obligated to pay for lands acquired by the Corporation Counsel in behalf of the several subordinate administrative branches of the city government without the sanction or approval of that Board. In order to appreciate the constant, enormous, unliquidated liability of the city for lands acquired in condemnation proceedings, permit me to refer to the fact that at the date of consolidation the City of New York had acquired title to and taken possession of land valued at nearly $38,000,000, which had not been paid for because the awards had not been confirmed, and that proceedings were pending for the acquisition of additional land valued at over $5,000,000, the title to which had not then vested in the city.

As to nearly all of these liabilities the Board of Estimate and Apportionment of the City of New York, as formerly constituted, had never had the opportunity of granting or withholding its approval. The liabilities had been incurred through the action of city departments and other boards of the city government acting independently, and it was only when the awards, having been confirmed by the Supreme Court, became payable, that the Board of Estimate and Apportionment was called upon to exercise the purely ministerial and perfunctory

duty of authorizing the issue of bonds, for the failure to perform which that board could have been mandamused. The Department of Finance had no official knowledge of these liabilities, and when it became necessary to obtain knowledge of the extent thereof that knowledge had to be sought laboriously and with difficulty in the records of other departments.

The Greater New York Charter is equally deficient in this respect.

In order to understand this more readily it may be well to give concrete illustrations.

(1.) The Commissioner of Water Supply desires (as he has recently) to acquire a large and expensive tract of land to increase the supply of water. He prepares maps which receive the approval of the Board of Public Improvements (Section 486). These maps are filed by the Corporation Counsel (Section 489), who *shall* thereupon apply for the appointment of Commissioners of Appraisal (Section 490), who, upon appointment, duly file their oaths of office (Section 493), whereupon the "City of New York shall be and become seized in fee of all those parcels of real estate which are shown on the said map hereinbefore referred to" (Section 494). It is at this time that the city becomes liable or "indebted" for the land taken, yet neither the Board of Estimate and Apportionment nor the Comptroller is officially advised of this fact until, perhaps, years afterwards, when, the awards having been made and confirmed by the Supreme Court these officials are required (Sections 509, 510, 169) to authorize (*sic*) the issue of the necessary bonds.

(2.) The Board of Public Improvements determines to lay out a new park (Section 436), the whole cost of which is to be borne by the city of New York, and directs the Corporation Counsel to begin condemnation proceedings for that purpose (Section 970). Said Board also by resolution vests

the title to the lands in the city prior to confirmation of the report of the Commissioners (Section 990) at which time the city becomes liable or "indebted." When the awards are payable and the necessary bonds *must* be issued the Board of Estimate and Apportionment is apprised for the first time of the liabilities thus incurred.

(3.) The Board of Docks directs the Corporation Counsel to acquire title to water-front property by condemnation proceedings (Section 822) and it becomes the duty of that official to proceed in accordance with his instructions. The value of the land may be ten or twenty millions, but if he asks any questions as to the financial ability of the city to pay for it, there is nowhere in the law any provision requiring this perfectly proper curiosity to be satisfied. There is a certain responsibility on the Board of Docks that the bonds issued in behalf of the Department shall not exceed $3,000,000 per annum (Section 180), but as it would be uncertain when the awards would become payable it would be a difficult matter to show that the Board were indirectly evading this provision of law. If, on the other hand, after the property had been taken by the city, it should require an issue of bonds in excess of $3,000,000 per annum to pay the awards to the property owners, it is doubtful whether that limitation would be respected by the Courts at the cost of allowing a person's property to be taken without prompt compensation.

The Board of Estimate and Apportionment has no voice and no official knowledge of the enormous liabilities which can thus be incurred.

These examples might be multiplied almost indefinitely, for the truth is that there is practically no check by the responsible financial officers of the city on the liabilities for land damage which the several departments incur. Even the Corporation Counsel cannot check them except by an abuse of

power ; for he is vested with no discretion in regard to undertaking the proceedings. When it is borne in mind that it is for awards for lands that the proceeds of bonds are chiefly needed (by far the larger part of bond sales being applied for this purpose) it will be seen how loose and fatally defective the city's financial system is in this respect.

An exception has been made in the amendment relating to the opening of streets, because in nearly all cases the awards for this purpose are offset by assessments on the property benefited by the openings and the city's obligations are therefore merely temporary.

(*b.*) *As to the second amendment, relating to confessions of judgment by the corporation counsel.*

The provision of law in the Greater New York Charter (§ 149) regulating the settlement and adjustment of claims against or in favor of the city is identical in language with that contained in the New York City Consolidation Act of 1882 (§ 123).

It reads as follows :

"He (the Comptroller) shall settle and adjust all "claims in favor of or against the corporation, and "all accounts in which the corporation is con- "cerned as debtor or creditor."

This is the only specific grant of power on the subject contained in either the present Charter or the former Consolidation Act.

Nevertheless every Corporation Counsel has, since 1876, maintained that as soon as a claim was put in suit he possessed the power to settle, adjust and compromise the same as an implied power incidental to the conduct of the city's law business.

In 1876, when this controversy first arose between Hon. Andrew H. Green, then Comptroller, and Hon. W. C. Whitney, then Corporation Counsel, opinions were obtained from Hon. W. M. Evarts and Hon. George T. Curtis, that such an implied power existed. Mr. Whitney's position, however, was quite moderate as compared with that of the present Corporation Counsel.

Mr. Whitney apparently was satisfied with the contention that when the adjustment of a claim involved only a question of law he should be free to offer judgment, as, for example, if the facts, if admitted or proved, would not constitute a legal defense.

This is apparent from the following extract from Mr. Whitney's letter to Comptroller Green :

"All cases in which we have failed to act har- "moniously with each other, and in which between

"us both the City suffered, *are cases involving* "*questions of law only*; for, since my accession "to office, I have never failed to assume as *correct* "*all statements of fact made by any administra-* "*tive department with regard to which I deem* "*myself to have no discretion*, whatever my opin- "ion may be in regard to the probability of sus- "taining the allegation of fact made by such "department."

Each successive Comptroller and Corporation Counsel has maintained stoutly his own view of the law, but, prior to consolidation, the controversy was never submitted to the courts for adjudication, and never became a practical matter because these officers have always approached each other in a spirit of compromise and harmony designed to prevent unseemly contention and promote the proper protection of the city's interests. On the one hand, no Comptroller has objected to the settlement by the Corporation Counsel of claims which involved only questions of law, while, on the other hand, the settlement of claims involving questions of fact and the exercise of business judgment and discretion, have, with substantial uniformity, been submitted to the Comptroller.

In the early part of 1898 the present Comptroller endeavored to continue and perpetuate this amicable and efficacious *modus vivendi* (see letter, Appendix III). The reply of the Corporation Counsel (see Appendix IV) shows the spirit in which this advance was met. It exhibited a change of attitude which was apparently irreconcilable.

The issue thus raised seemed of paramount importance.

It is apparent that if a claimant, after failing to secure what he regards as a satisfactory settlement from the Comptroller, can, by the simple process of serving a summons, take his claim over to the office of the Corporation Counsel and obtain a settlement more advantageous to his interests, the Law Department takes the place of the Department of

Finance as the Auditing branch of the city government.

Such a result was seen to be inevitable, and the result foreseen has actually come to pass.

Consider for a moment the revolutionary nature of this change as applied to the scheme of government provided by the Charter.

1. The Comptroller is the only official to whom the law makes a specific grant of power to settle and adjust claims. The alleged power of the Corporation Counsel has to be elaborately implied from the duty of having "charge and conduct of all the law business of the corporation and its departments and boards."

2. An attorney possesses no power to make an offer of judgment in behalf of a private client without the latter's consent. In the case of a municipal corporation, like the City of New York, which can act only through its duly authorized representatives—in this case the Comptroller—such consent should also be obtained.

3. The Charter provides that "the finance department shall have control of the fiscal concerns of the corporation." Yet it is claimed that the mere service of a summons will transfer that control to the Law Department.

4. The Comptroller is an officer elected by the people; the Corporation Counsel is appointed by the Mayor.

5. The Comptroller gives an official bond of $200,000; the Corporation Counsel one of $5,000.

6. Nothing is clearer than that the Comptroller, at least before suit brought, is vested with absolute discretion, subject to his responsibility as an official in the settlement and adjustment of claims for and against the City.

He certainly was not intended to be a mere automaton or machine.

But in what matters is discretion of the greatest importance?

Certainly not in uncontested claims—in matters where the rights of the City are perfectly clear and defined.

In such matters no discretion is necessary. The payment of a just debt involves nothing but the drawing of a warrant—a purely ministerial act—where the facts are certain and well known.

On the other hand, it is precisely in questions where the City's rights are contested and are doubtful that discretion is essential.

It is in complicated and not in clear financial matters that the highest intelligence is needed for the protection of the vast interests belonging to the municipality.

And yet the contention of the Corporation Counsel, if correct, would result in entirely taking that discretion from the officer in whom it is expressly vested at the very time and under the very circumstances when its exercise becomes of the greatest importance, and in placing it solely upon the shoulders of another officer, concerning whose powers in this regard the statute is wholly silent.

And, moreover, it must be kept in mind that the result would not be merely a transfer of that discretion, but would be to vest the Corporation Counsel with the powers of a Court of Appeal to reverse, annul or modify the discretion which the Comptroller had theretofore exercised.

In other words, the use by the Comptroller in the rejection of a claim against the city of the discretion with which he is expressly vested by the Charter would result, instead of rendering his discretion effectual, in vesting another official with full and unrestricted power to undo that which the Comptroller had purported to accomplish.

7. The action of the Comptroller in paying claims against the city is carefully hedged about by an elaborate system of checks; no such pro-

vision is made for the Corporation Counsel. For example, it is provided (§ 195) that no warrant for the payment of the city's moneys "shall be signed by the Comptroller or countersigned by the Mayor, except upon vouchers for the expenditure of the amount named therein, *examined and allowed by an auditor of accounts*, approved by the Comptroller, and filed in the Department of Finance, *except in the case of judgments*."

This last exception ought to be conclusive as to the intent and spirit of the law. *Judgments need not be audited by an auditor of accounts before being paid by the Comptroller.*

Why? Because it was assumed that judgments would come to the Comptroller for payment after an audit of the most thorough efficiency—the trial of an action. The city in paying a judgment might be supposed to have the protection of a Court, and its solemn decision based upon both law and facts. YET IN THE LAST TWO YEARS NOT ONE JUDGMENT IN TEN THAT HAS BEEN PAID OUT OF THE CITY TREASURY HAS REPRESENTED ANYTHING BUT THE SOLE, UNCONTROLLED AND UNCHECKED ACTION OF AN APPOINTIVE OFFICER. Where judgment is entered by consent or by default or upon offer of judgment, the judicial decree represents nothing but the acquiescence of the defendant. The Charter names the Comptroller as the officer to acquiesce in behalf of the city and under these circumstances to use the empty "judgments" of Courts as a cover for the audits of the Corporation Counsel is a prostitution of the judiciary system of the State.

The only machinery for audit in the city government provided by the Charter is in the Department of Finance—in the "Auditing Bureau" of that department. Section 151 provides that this bureau shall have such "clerks and assistants, examiners, engineers, inspectors and employees as the Comptroller may deem necessary and proper."

The Comptroller has them; the Corporation Counsel has not.

In view of these considerations recourse was had to the Courts.

A taxpayer's action was brought by Mr. Irving T. Bush with the view of obtaining an adjudication. Mr. Justice Prior at Special Term rendered a decision upholding the views of the Corporation Counsel. It has been impossible as yet to secure a review of this decision on appeal.

In the meantime, however, the Corporation Counsel himself began a proceeding to set aside judgments confessed by his predecessor in the sum of $700,000 in favor of certain aqueduct contractors whose claims had previously been rejected by the Court of Appeals. Neither the Comptroller nor Mr. Bush were permitted to be heard in this proceeding. The Corporation Counsel in his argument carefully avoided the question of inherent power, and, as a result, the Appellate Division of the Supreme Court sustained the judgments in question on the assumption of fact, that Comptroller Fitch had acquiesced in the settlement. The Court divided three to two, the minority (Judges McLaughlin and Patterson) holding as a matter of fact that "the Comptroller did *not* consent to the settlement," and then decided squarely that under the circumstances the Corporation Counsel possessed no power to make such an offer of judgment.

This dissenting opinion being the only opinion of any Appellate Court on this subject is printed in full hereafter, and particular attention is called to the strong expressions contained therein. (See Appendix V.) The decision of the Court of Appeals in this case having been based upon a certificate from the Appellate Division containing a statement of fact (believed by a majority of the Judges) that the Comptroller acquiesced in the settlement does not, of course, touch upon the controversy in question.

It would seem, therefore, so far as judicial opin-

ions are concerned, that ultimately the contention of the Comptroller will be sustained by the Appellate Courts. But such a result can be hoped for only after long delays. The evil complained of should be relieved at once by appropriate legislation. If, by any possibility the Court of Appeals should decide that the Corporation Counsel possesses the power under the cover of legal proceedings to dispose of the city's property without let or hindrance the law should be amended. If, on the other hand, the decision should be the reverse that decision should be forestalled.

In the arguments made by the Corporation Counsel in the Bush litigation undue stress was placed upon the contention that to require the approval of any other official for offers of judgment would interfere with and delay the conduct of the city's business. This argument ignores the fact that some check of this kind is met with in the charters of nearly all large cities, and that in the ordinary routine of the business of the Department of Finance thousands of vouchers are submitted by the Comptroller to the Corporation Counsel for advice, on account of which the latter has never been heard to complain that the city's business has been delayed.

In private litigation the fact that the approval of the client is necessary to a compromise of the case has never been found to interfere in the slightest degree with the efficiency of the services performed by the attorneys. The client is absolutely unable, even should he be desirious, of directing the attorney in matters of law. He is, however, perfectly able to understand the conclusion which will follow from the settling of or omission to settle his rights, and when this question arises there is no reason whatever why it should not be presented to the client by the attorney, together with the advice of the latter as to those matters wherein he is particularly qualified

to advise, thus subjecting the question to the inspection of two minds instead of one.

The same is true as to a municipal corporation.

I venture to say that if the power of the Comptroller, as herein claimed, is fixed and limited beyond controversy, there will be no greater danger of any detriment to the city's interests than there would be in the case of a private client, *and, on the contrary, that the necessity which will thus arise for a consultation between two of the chief officers of the municipality in matters of such importance as the city's rights is much better calculated to protect the city's rights than would be the case if a power of such vast and far-reaching importance be left solely to the control of the legal adviser.*

II.

Assembly Bill No. 741.

This bill (see Appendix II) amends Section 149 of the Charter, relating to the Department of Finance in the following particulars:

(*a.*) By enabling the Auditing branch of the city government to pass upon the reasonableness of liabilities incurred by heads of departments upon "departmental orders"—*i. e.*, contracts of less than $1,000 each made without competition among bidders.

(*b.*) By providing a fund out of which claims settled and adjusted by the Comptroller under the powers which he now possesses by law may be paid.

(*c.*) By placing in the hands of the Board of Estimate and Apportionment control over the liabilities to be incurred for local improvements each year payable from the Street Improvement Fund.

(a.) *In regard to the first amendment relating to "departmental orders."*

The Auditing Bureau and the Comptroller are popularly supposed to possess powers under the Charter which would enable them in the audit of bills, to check extravagance or improvidence on the part of heads of departments and others authorized to incur liability in behalf of the city. This popular impression is erroneous. Contracts exceeding $1,000 in amount must be made at public letting after due advertisement and competition as provided by law. Contracts of less than this amount, however, can be made without competition. There has always been a tendency on the part of some city officials to evade the provisions of law requiring public letting of contracts by dividing the orders on works into

amounts of less than $1,000 each, and it has frequently happened that the prices agreed to by departments have been excessive. Sometimes after investigation by the Auditing Bureau this has been admitted by the heads of departments making the contracts. Nevertheless, under the law as it now stands, it has been held that the agreement made by the head of the department with the contractor, is final and conclusive, and that the Auditing Bureau and the Comptroller possess no power to reduce the prices charged. Such a decision was rendered by the Supreme Court even in such a flagrant instance as the Eagle Safe case (see Appendix VII), where it was held that the action of the Commissioner in issuing the departmental order was binding upon the city no matter how excessive the prices charged might have been. Under these circumstances the work of auditing claims becomes merely perfunctory and might as well be performed by an automaton. The amendment in question enables the Comptroller to reduce excessive claims while offering all necessary and proper protection to the legal rights of the contractor.

(b.) *In regard to the second amendment creating a fund out of which claims settled and adjusted by the Comptroller may be paid.*

There are always a certain number of claims presented to the Comptroller for settlement each year, the justice of which is not disputed, but which cannot be paid by the Comptroller because no proper fund exists out of which payment can be made. The Comptroller is therefore obliged to refuse payment of these claims, and after suit is begun it is the practice of the Corporation Counsel to offer judgment, whereupon the claims in question are paid out of the judgment fund, which can be by law constantly replenished by the issue of revenue bonds. The existence of this class of claims offers a constant excuse for the practice of

confessions of judgment by the Corporation Counsel, although this course mulcts the city in considerable amounts of legal costs which could otherwise be avoided. The amendment in question establishes a "claim fund" on the same basis as the judgment fund is now established by law, and will enable the Comptroller to pay those claims promptly, thereby rendering prompt justice to the city's just creditors and saving a considerable amount annually in the costs of legal proceedings.

It is not believed that this amendment will excite opposition from any quarter, since the Corporation counsel has caused a bill to be introduced in the Legislature intended to accomplish the same result.

(c.) *In regard to the third amendment limiting the liabilities to be annually incurred in behalf of the street improvement fund.*

The liabilities of the Street Improvement Fund arise out of contracts for local improvements, the costs of which are ultimately to be borne by assessments upon the property benefitted. The assessment lists, however, are not transmitted to the Board of Assessors until after each work is completed, and it is many years after the city has advanced the money to contractors in payment of work performed, before the assessments are collected from the property owners. The result is that assessment bonds have to be issued to replenish this fund in very large amounts, and these bonds technically form a part of the city's funded debt. Owing no doubt to the fact that the law contemplates the ultimate reimbursement of the city for amounts thus advanced in behalf of property owners, an exception is made in the Charter (§ 149), in favor of this class of contracts by allowing them to be made in unlimited amounts without the necessity of certificates by the Comptroller that

funds have been provided to meet the expense thereof.

While it may be desirable not to place these contracts on the same footing as ordinary contracts, the whole expense of which is borne by the city, it is, nevertheless, necessary that some check should be established whereby the city might not be compelled to issue assessment bonds in excessive amounts at times when it would be financially impossible or undesirable to do so. The amendment in question, therefore, authorizes the Board of Estimate and Apportionment to determine how many of these contracts in the aggregate may be entered into in any fiscal year and the Comptroller's certificate is then required only in regard to the fact that each such contract as presented to him for registration does not together with the amount of all similar contracts previously entered into during the current year exceed the aggregate amount thereof so authorized by the Board of Estimate and Apportionment.

It will be seen therefore that Assembly Bills Nos. 741 and 742 while independent measures, each desirable in regard to the subject matter respectively contained therein, supplement each other, and taken together constitute a scheme of amendatory legislation for the financial system of the city which will correct serious evils, the existence of which has been recognized for many years by students and critics of the municipal government of the city of New York.

I have the honor to be with great respect,

Your obedient servant,

BIRD S. COLER,
Comptroller.

APPENDIX NO. I.

STATE OF NEW YORK.

No. 742. Int. 653.

IN ASSEMBLY,

FEBRUARY 5, 1900.

Introduced by Mr. FALLOWS—read once and referred to the committee on affairs of cities.

AN ACT

To amend chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven, entitled "An act to unite into one municipality under the corporate name of the city of New York the various communities lying in and about New York harbor, including the city and county of New York, the city of Brooklyn and the county of Kings, the county of Richmond, and part of the county of Queens, and to provide for the government thereof," relative to the law department.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two hundred and fifty-five of chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven is hereby amended so as to read as follows:

§ 255. There shall be a law department of the city of New York, the head whereof shall be called the corporation counsel, who shall be the attorney and counsel for the city of New York, the mayor, the municipal assembly, and each and every officer, board and department of said city, except as otherwise herein provided. The salary of the corporation counsel shall be fifteen thousand dollars a year. The corporation counsel shall have charge and

conduct of all the law business of the corporation and its departments and boards, and of all law business in which the city of New York is interested, except as otherwise herein provided. He shall have charge and conduct of the legal proceedings necessary in opening, widening, altering and closing streets, and in acquiring real estate or interests therein for the city by condemnation proceedings, and the preparation of all leases, deeds, contracts, bonds and other legal papers of the city or of, or connected with, any department, board or officer thereof, and he shall approve as to form all such contracts, leases, deeds, bonds and other legal papers; *provided, however, that he shall not institute any proceeding for acquiring title to real estate by condemnation proceedings, except for opening streets, unless the same shall have been approved by the concurrent vote of all the members of the board of estimate and apportionment upon a statement to be furnished said board, of the valuation of such real estate as assessed for purposes of taxation; and provided, further, that the board of estimate and apportionment, shall have power by a majority vote to direct such changes to be made in the forms of contracts and specifications as may seem to promote the interests of the city.* He shall be the legal adviser of the mayor, the municipal assembly and the various departments, boards and officers except as otherwise herein provided, and it shall be his duty to furnish to the mayor, the municipal assembly and to every department, board and officer of the city all such advice and legal assistance as counsel and attorney in or out of court as may be required by them, or either of them, and for that purpose, the corporation counsel may assign an assistant or assistants to any department that he shall deem to need the same. No officer, board or department of the city, unless it be herein otherwise specially provided, shall have or employ any attorney or counsel. The corporation counsel, except as other-

wise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises, or demands of the city, or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines, or penalties or to enforce the laws and ordinances. He shall be a member of the board of estimate and apportionment, and of the board of public improvements. *He shall not be empowered to compromise, settle or adjust any rights, claims, demands or causes of action in favor of or against the city of New York, or to permit, offer or confess judgment against the city, or to accept any offer of judgment in favor of the city without the previous written approval of the comptroller; and in case of any claim for a money judgment exceeding ten thousand dollars, or for relief other than in the nature of a money judgment, the previous written approval of the mayor shall be also necessary.*

§ 2. This act shall take effect immediately.

APPENDIX NO. II.

STATE OF NEW YORK.

No. 741. Int. 652.

IN ASSEMBLY,

February 5, 1900.

Introduced by Mr. FALLOWS—read once and referred to the committee on affairs of cities.

AN ACT

To amend chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven, entitled "An act to unite into one municipality under the corporate name of the city of New York the various communities lying in and about New York harbor, including the city and county of New York, the city of Brooklyn and the county of Kings, the county of Richmond, and part of the county of Queens, and to provide for the government thereof," in regard to the department of finance.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and forty-nine of chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven, is hereby amended so as to read as follows:

§ 149. The finance department shall have control of the fiscal concerns of the corporation. All accounts rendered to or kept in the other departments shall be subject to the inspection and revision of the officers of this department. It shall prescribe the forms of keeping and rendering all city accounts, and except as herein otherwise pro-

vided, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers and employes of the corporation shall be paid. All payments by or on behalf of the corporation, except as otherwise specially provided, shall be made through the proper disbursing officer of the department of finance, on vouchers to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller, and countersigned by the mayor. *All contracts involving an obligation payable from the city treasury for work to be done or supplies to be furnished, not made at public letting in the manner provided in section four hundred and nineteen of this act, shall be evidenced by orders or requisitions in writing upon forms to be approved by the comptroller, signed by the proper head of the department, board, officer or commission. Such orders shall either state the specific amount agreed upon for the said work or supplies, or shall state that payment therefor shall be at the current market rates, but in either event it shall be lawful for and the duty of the department of finance in auditing and paying claims against the city treasury arising thereunder, to deduct therefrom any charge in excess of such current market rates; provided however, that such action by the department of finance shall not be conclusive to the extent of preventing creditors of the city of New York from disputing the justice of such determination by a proper action at law. No claim shall be enforceable at law against the city of New York for work done or supplies furnished, not arising out of a contract made at public letting, and excepting purchases for contingencies of less than ten dollars unless the same shall have been duly ordered by the proper head of department, board, officer or commission in the manner herein provided, and a reference to this section shall be printed on all such requisitions or orders.* The comptroller may require any person presenting for settlement an ac-

count or claim for any cause whatever, against the corporation, to be sworn before him touching such account or claim, and when so sworn, to answer orally as to any facts relative to the justness of such account or claim. Willful false swearing before him is perjury, and punishable as such. He shall settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor; but in adjusting and settling such claims, he shall, as far as practicable, be governed by the rules of law and principles of equity which prevail in courts of justice. The power hereby given to settle and adjust such claims shall not be construed to give such settlement and adjustment the binding effect of a judgment or decree, nor to authorize the comptroller to dispute the amount of any salary established by or under the authority of any officer of department authorized to establish the same, nor to question the due performance of his duties by such officer, except when necessary to prevent fraud. *Claims settled and adjusted by the comptroller under the authority of this section, shall, if no appropriation in the budget be properly applicable thereto, be paid from the proceeds of revenue bonds issued as provided by section one hundred and eighty-eight of this act; provided, however, that where such claim shall amount to ten thousand dollars or more the approval in writing of the mayor shall be obtained before payment thereof shall be made.* The comptroller shall not reduce the rate of interest upon any taxes or assessments below the amount fixed by law. No contract hereafter made, the expense or the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force, unless the comptroller shall endorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated ex-

pense of executing such contracts as certified by the officer making the same. But this provision shall not apply to work done, or supplies furnished, not involving the expenditure of more than one thousand dollars, unless the same is required by law to be done by contract at public letting. It shall be the duty of the comptroller to make such endorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount so specified by the officer making the contract, and to thereafter hold and retain such sum to pay the expense incurred until the said contract shall be duly performed. And such endorsement shall be sufficient evidence of such appropriation or fund in any action. *In the case of contracts payable in whole or in part from assessments upon the property benefited, the aggregate amount thereof to be entered into by the city of New York in any one calendar year, shall not exceed the amount thereof which shall be authorized by the board of estimate and apportionment for such year by resolution adopted by the concurrent vote of all the members thereof; and no such contract shall be binding or of any force, unless the comptroller shall indorse thereon his certificate, that the amount thereof together with the amount of all similar contracts previously entered into during the current year does not exceed the aggregate amount thereof so authorized by the board of estimate and apportionment.* The comptroller shall furnish to each head of department, weekly, a statement of the unexpended balances of the appropriation of his department. Wages and salaries, except as otherwise provided in this act, may be paid upon payrolls, upon which each person named thereon shall separately receipt for the amount paid to such person, and in every case of payment upon a payroll, the warrant for the aggregate amount of wages and salaries included therein may be made payable to the superintendent, foreman or other officer designated for the

purpose. The comptroller shall enter into, upon behalf of the city of New York, any lease authorized by the commissioners of the sinking fund of property leased to the city. The assent of the comptroller shall be necessary to all agreements hereafter entered into by any city officer, *board*, *commission* or department for the acquisition by purchase of any real estate or easement therein, when such an agreement involves an obligation to pay or an expenditure of any money on behalf of the city, and in any proceedings that may hereafter be had to acquire real estate or hereditaments for or on behalf of the corporation of the city of New York, before an award shall be confirmed, imposing an obligation upon the city to pay any moneys, the comptroller shall have thirty days' notice in writing, stating before whom and at what time such proceeding will take place. The comptroller of the city of New York shall be elected and shall hold office as provided in this act and he shall receive an annual salary of ten thousand dollars.

§ 2. This act shall take effect immediately.

APPENDIX NO. III.

CITY OF NEW YORK,

FINANCE DEPARTMENT,

COMPTROLLER'S OFFICE.

March 14th, 1898.

Hon. JOHN WHALEN,
Corporation Counsel.

SIR:

I have received your communication of the 8th inst. transmitting, with your approval, a transcript of judgment in the case of Edward R. Schafer, as administrator, against The Mayor, etc., in which you state that this suit was compromised by your offer of judgment in pursuance of a settlement of the claim which you effected with the attorneys. Of this settlement the Comptroller had no notice.

I desire to submit for your careful consideration, certain questions in regard to the settlement of claims against the City which have been put in litigation.

Both under section 123 of the Consolidation Act and under section 149 of the Charter, the Comptroller is the officer charged with the duty of settling and adjusting "all claims in favor of or against the corporation." I am aware of the fact that it has always been asserted by the Law Department that this grant of power was not exclusive to the extent of barring the Corporation Counsel from settling claims against the City without the approval of the Comptroller where an action has once been begun.

In this contention the Finance Department has never acquiesced, and the subject has been the cause of lengthy and exhaustive correspondence, which is to be found on the files of our respective departments.

Fortunately for the City, this disagreement between the two departments has never, to my knowledge, reached the practical stage of submission to the Courts; for while each Corporation Counsel has always maintained his right in law to settle all claims in litigation without concurrence by the Comptroller, such settlements have for many years, by amicable agreement, been submitted to the head of the Finance Department for his consideration. On the other hand no Comptroller, has, as I am informed, stood on his undoubted right to effect settlements of claims against the City, without the co-operation of the Corporation Counsel, but such settlements have been uniformly submitted to the judgment of the head of the Law Department. Whatever exceptions there may have been in the last twenty years to this rule, they will be found to be so few or unimportant as only to emphasize the good faith with which this agreement has been maintained.

This friendly co-operation of the two departments has been of great advantage to the City. It need be taken as reflecting in not the slightest degree on the good faith of any of your predecessors or their assistants to state that the records of this department show a large number of instances where settlements submitted by the Law Department have been finally compromised at amounts considerably smaller after action thereon by the Comptroller. I have no doubt also that the converse has been true in the case of settlements initiated by the Comptroller. Whatever the actual amount of saving to the City has been as the result of this practice, I feel that it scarcely needs an argument to demonstrate the desirability of maintaining such a check; since the unlimited power of compromise granted by both the Consolidation Act and the Charter is too vast to be properly exercised by the fallible judgment of any one public servant.

From another point of view, also, it seems to me

that the co-operation of our two departments should be maintained in the future as in the past.

I have the utmost confidence in the judgment and discretion of the present head of the Law Department, and it is by no means because I have any overweening regard for my own judgment that I am addressing this communication to you. The history of municipal government, unfortunately shows, however, that at some time in the future it may transpire that the conduct of the Law Department will pass under the control of some one less able or less zealous in the public service than yourself. Should this happen the City would certainly have cause to regret a departure from that salutary check in the settlement of claims against the City, which has heretofore prevailed. It is, therefore, largely on account of the importance of the precedent which you would be setting if you should establish the position that the Comptroller and the Corporation Counsel should not consult each other in the settlement of claims against the City that I respectfully urge upon your attention the desirability of continuing the relation of our two respective departments on the same basis as has heretofore existed.

It will be quite sufficient, if, as heretofore, in cases which you propose to settle, you notify the Comptroller of the terms of the proposed settlement, with the statement that if no objections are submitted within a certain number of days, an offer of judgment will be made.

In view of the importance of this matter, I would be gratified at receiving an early reply.

Very truly yours,

BIRD S. COLER,
Comptroller.

APPENDIX NO. IV.

LAW DEPARTMENT

OFFICE OF THE CORPORATION COUNSEL.

NEW YORK, May 16th, 1898.

Hon. BIRD S. COLER,
Comptroller.

SIR.—I am in receipt of your communication, bearing date 14 March, submitting to me certain questions in regard to the settlement of claims against the city, which have been put in litigation.

The matter which gave rise to your communication, was the transmission to you by me, with my approval, of a transcript of judgment in the case of Edward R. Schafer, as Administrator, against The Mayor, etc., in which I stated that this suit was compromised by my offer of judgment, in pursuance of a settlement of the claim, and you correctly state that of this settlement the Comptroller had no notice.

Your letter is quite lengthy, but I take from it the following passages, which state, in substance your suggestion and contention:

> "Both under Section 123 of the Consolida-
> "tion Act and under Section 149 of the Char-
> "ter, the Comptroller is the officer charged
> "with the duty of settling and adjusting 'all
> "claims in favor of or against the corporation.'
> "I am aware of the fact that it has always
> "been asserted by the Law Department that
> "this grant of power was not exclusive to the
> "extent of barring the Corporation Counsel
> "from settling claims against the city with-
> "out the approval of the Comptroller where
> "an action has once been commenced.
>
> "In this contention the Finance Depart-
> "ment has never acquiesced, and the subject
> "has been the cause of lengthy and exhaustive
> "correspondence, which is to be found on the
> "files of our respective departments.

"Fortunately for the city, this disagree-
"ment between the two departments has
"never, to my knowledge, reached the prac-
"tical stage of submission to the Courts; for,
"while each Corporation Counsel has always
"maintained his right in law to settle all
"claims in litigation without concurrence by
"the Comptroller, such settlements have for
"many years, by amicable agreement, been
"submitted to the head of the Finance De-
"partment for his consideration. On the
"other hand, no Comptroller has, as I am in-
"formed, stood on his undoubted right to
"effect settlements of claims against the city,
"without the co-operation of the Corporation
"Counsel, but such settlements have been
"uniformly submitted to the judgment of the
"head of the Law Department. Whatever
"exceptions there may have been in the last
"twenty years to this rule, they will be found
"to be so few or unimportant as only to
"emphasize the good faith with which this
"agreement has been maintained.

"This friendly co-operation of the two de-
"partments has been of great advantage to
"the City. It need be taken as reflecting in
"not the slightest degree on the good faith of
"any of your predecessors or their assistants
"to state that the records of this department
"show a large number of instances where set-
"tlements submitted by the Law Department
"have been finally compromised at amounts
"considerably smaller, after action thereon by
"the Comptroller. I have no doubt also, that
"the converse has been true in the case of
"settlements initiated by the Comptroller.
"Whatever the actual amount of saving to
"the city has been as the result of this prac-
"tice, I feel that it scarcely needs an argu-
"ment to demonstrate the desirability of
"maintaining such a check; since the unlim-
"ited power of compromise granted by both
"the Consolidation Act and the Charter is too
"vast to be properly exercised by the fallible
"judgment of any one public servant."

If I were to take the literal wording of your communication, there would be no particular

reason for answering it at any great length, because there has been no change from the commencement of my administration to the present time, from the policy pursued by this office towards the Finance Department.

But, in spite of its courteous wording, your communication is not only a suggestion for harmony and co-operation between the two departments, a suggestion which in every respect coincides with my views and wishes, and I may add, with my conduct of the Law Department, there is underlying your suggestion an expression of the theory so often, so uniformly, and I may add, so unsuccessfully maintained by your predecessors, that the Finance Department has the right of supervision over the Law Department of the city in regard to the settlement by the latter department of claims in litigation.

This claim on the part of the Finance Department has been made with unfailing regularity by each succeeding Comptroller, almost from the origin of the two departments. And the Law Department has always successfully resisted it, as an assumption of authority which would simply add this department to the five bureaus in the Finance Department.

The position of the Law Department has always been very simple and perfectly consistent. It is, that the Corporation Counsel is in no sense the attorney of the Comptroller, but is the law officer of the public corporation.

The only right which the other departments have, as regards the Law Department, is to call upon it for legal advice and assistance.

Up to the time of the bringing of an action, this department has nothing to do with a claim, except to examine it when you so request, and has not the slightest control over your action, nor, indeed, any desire to exercise such control, leaving to your department, its full, legal right of settlement.

But, from the moment that the summons has been served, and the action commenced, the situation is entirely changed. Your department then loses all jurisdiction over the settlement of the claim which has taken the form of litigation.

Within the legal bounds of his authority, as law officer of the city, the Corporation Counsel has the right and duty to settle such a claim, if, in his opinion, after an examination of the law applicable to the case, such a settlement is advisable, and as to that settlement you have neither power, duty nor discretion or responsibility.

The difference between the powers of the two departments is therefore sharply defined, and the cooperation and harmony which your letter suggests, can only be carried out by an adherence of each of them to its own special jurisdiction.

Upon this question, some correspondence was had in former years between the Finance and Law Departments, upon the question of their rights and duties of law, and in the course of the controversy which had then arisen between them, there were procured by the then Corporation Counsel, Hon. William H. Whitney, two letters, one from the Hon. William M. Evarts and the other from the Hon. George Ticknor Curtis.

Of the correspondence, including the letters of Mr. Evarts and Mr. Curtis, I herewith enclose you a copy, and request you to peruse the same.

I may add that I shall in the future, act in every case which is in litigation, in the manner which, in my judgment and belief, and within the limits of my powers, shall be most advantageous to the interests of the city.

And if those interests, in my opinion, require a compromise, a compromise will be made by me.

All of the foregoing communication has been written in answer to that portion of your letter which treats the question as one of power, but there is another side to it, however, which you also touch upon, and which has two different aspects.

The first of these is the question of the advantage to the city of the conference or consultation between the two departments, prior to the settlement of claims.

The other aspect of the question is shown in that part of your letter, wherein you seek to point out to me that whatever may be the honesty or ability of the present administration of this office, yet, in the future, the office may be controlled by some one who may be wanting in either or both, and therefore, that the precedent should not be established of acting without the advice of the Finance Department.

As to the question of advisability, I have always been ready to consult your Department in regard to pending matters, whenever I thought I could obtain from you any information which would assist me in the conduct of the affairs of my department, and I shall always, in every case in this office, wherein I have any reason to suppose that you are in possession of any information or knowledge which I should obtain before settling a case, communicate with you in regard to the matter.

As you must know, the actual settlements made by this office without any communication with your department are very rare, and they have always been made entirely for legal reasons, which no information from your department could in any way alter.

The case of Shafer against The Mayor, referred to in your letter, is an illustration of what I mean.

This was a very close case, but, when the Court of Appeals had decided all the questions of law which were in the case, it became very evident that, on a new trial, before a jury, the City would an mulcted very heavily.

Therefore, the settlement to which you refer, be, which might on its face seem somewhat large, was made, and I have no doubt saved the City several thousands of dollars.

As the settlement in this case was based entirely upon a question of law, this was a matter in which your assistance would have been entirely unavailing, and I had excellent reason to believe, that as to the amount, a settlement could not be procured upon lower terms than those agreed upon.

As to the last suggestion in your communication, that some future Corporation Counsel, unchecked by your department, may take some action to the city's injury, I can only say that I hope for better things.

The head of any department can, by his negligence, or positive wrongdoing, do the City very great damage, but the fact that some future official will misuse his power furnishes no reason for the present head of a department for refusing to fulfill the duties imposed upon him by law.

The Finance Department is a most important one, but it has no right to review the discretion which the law has given to other departments. (People *ex rel.* Andrews *v.* Fitch, 9 App. Div., 439).

I will say in terminating, what I have already perhaps made clear, that while I do most emphatically deny that the Finance Department has any power in relation to the settlement of cases which are in actual litigation, and while I shall not fail to exercise the powers and fulfill the duties cast upon me by law, I shall always seek to obtain from the Finance Department such evidence or other information as may seem to me needful for any guidance in my action upon matters of law.

Yours,

(Signed) JOHN WHALEN,
Corporation Counsel.

One enclosure.

APPENDIX No. V.

SUPREME COURT.

In re O'BRIEN

AGAINST

THE MAYOR.

McLAUGHLIN, *J.* (dissenting)—I cannot agree with the other members of the Court to affirm this order. The Corporation Counsel, in my opinion, had no authority to make the offer upon which the judgments were entered, and, therefore, his act is not binding on the City. All the power which the City has is specifically expressed in or necessarily implied from the Charter; and the Corporation Counsel, the legal adviser of the City, has no power other than that derived from the City through the Charter, and every act assumed to be done by him in excess of that power is void. The charter in effect at the time the offer was made (Consolidation Act, Laws of 1882, chap. 410) did not confer upon the Corporation Counsel, either directly or impliedly, the power to do what he did, and his act is not sustained by any precedent that I have been able to discover. An attorney acting for an individual cannot, in the absence of express authority, make a compromise for his client, or conclude him in relation to the subject-matter of an action (Barrett *vs.* Third Avenue Railroad Co., 45 N. Y., 635); he cannot satisfy a judgment without payment in full, and if he does the satisfaction will be set aside (Beers *vs.* Hendrickson, 45 N. Y., 665); he cannot release his clients rights or subject him to a new obligation (Lewis *vs.* Duane, 141 N. Y., 314). The Corporation Counsel has no larger powers, as such, to bind the City than those connected with the ordinary relations of

attorney and client. This is precisely what was held in The People and Taylor *vs.* Mayor (11 Abb. Pr., 66). There judgment was rendered against the City of New York, and the Corporation Counsel, doing what he believed to be for the best interest of the City, stipulated not to appeal. Subsequently a motion was made to set aside the stipulation, and the Court held that it would not inquire into the merits of the action by considering whether the opening of the judgment would result in gain or loss to the City; that the Corporation Counsel had no power to make the stipulation, and, therefore, the City had a legal right to have it vacated. In the course of the opinion, delivered by Mr. Justice INGRAHAM, he said: "It would be almost impossible to form a correct idea of the consequences if it were ever established that any head of a department had the power, without the authority of the Common Council, to dispose of City rights and property, either directly or indirectly; and if the head of the Law Department can, at his pleasure, make the corporation a party to suits, and when a large recovery is had against the city can stipulate that the city shall not have any means of review or redress, he would possess an absolute control over the city property far beyond that possessed even by the Common Council. It appears to me that he possesses no such power, and the stipulations were unauthorized and cannot be sustained."

Here the Corporation Counsel had no power to make the offers, and the city has the legal right to have the judgments vacated, and it is no concern of the Court whether it is for the best interest of the city or not. The Court discharges its duty by determining the question according to the legal rights of the parties. The power to settle and compromise these actions, if the power existed at all (which it is not necessary now to determine), after the claims had been presented to and rejected by the Comptroller (McGinniss *vs.* Mayor, 26 Hun, 142), was lodged in the

Common Council. The actions are all based upon contracts, and before they were commenced the claims forming the basis of each were presented to and rejected by the Comptroller, and after such rejection, in the absence of some act of the Common Council, no other body or officer could obligate the city to pay the same or any part thereof. Section 74 of the Consolidation Act supports this view. That section, among other things, provides that "no additional allowance beyond the *legal claim* which shall exist under any contract with the corporation, or with any department or officer thereof, or for any services on its account or in its employment, shall ever be passed by the common council except by the unanimous vote thereof; and in all cases the provisions of any such contract shall determine the amount of any claim thereunder, or in connection therewith, against the said corporation, or the value of any such services."

But it is said—or such inference may fairly be drawn from the prevailing opinion—that the Corporation Counsel had power to do what he did, because his act was approved by the Mayor, the special counsel and the Aqueduct Commissioners, and that the Comptroller, if he did not consent, at least did not object. There is no doubt but that the officers connected with the City Government referred to, with the exception of the Comptroller deemed it wise, and for the best interests of the city, that the settlement should be made, and that they approved of the Corporation Counsel's act in making it. But I am unable to see that this has any effect upon the question of authority. The Corporation Counsel either had the power to make the offer or else he did not. If he did not have the power under the charter, then I do not see how it can be held that the power could be conferred upon him by special counsel retained solely to defend the actions, or by the Aqueduct Commissioners, whose powers were specified and so limited by the act creating them that they could

not obligate the city to pay any sum whatever for work done or materials furnished in the construction of the aqueduct not specified in the contracts which they were authorized to make; or by the Mayor, because he, an *ex officio* member of the Aqueduct Commission, happened to be present at the meeting when the resolution authorizing the settlement to be made was passed. The Comptroller did not consent to the settlement, and it was not necessary for him to object to it in order to prevent the city being bound by it.

The Corporation Counsel, as we have seen, had no authority under the charter to authorize the judgments to be entered, and something more than the facts which appear in the record must be shown before he could obligate the city to pay $700,000. The settlement may have been a wise one, but that has nothing to do with the question of whether or not he had the power to make it. The fact remains that the act of the Corporation Counsel was unauthorized, and the city having attacked it, as it had a legal right to do, the judgments should be vacated.

I am also of the opinion that the judgments should be vacated for want of consideration. The city is not an eleemosynary corporation. It must be just, but it cannot be generous. It must pay its obligations, but it cannot give its property away.

The claims involved in these actions, in the condition in which they were when the judgments were entered, could not be legally enforced against the City. This has been decided by the Court of Appeals in O'Brien *vs.* Mayor (139 N. Y., 343). A comparison of the complaint in the O'Brien action with the complaints in these will show that a recovery was sought in all the actions upon substantially the same grounds, and that a determination of one necessarily determined the rights of the parties in the others, and it was so considered by the Corporation Counsel, by the special counsel and by the plaintiffs themselves. These actions and the

O'Brien action were all brought in 1891. The O'Brien action was tried in June or July of that year, and from that time until after the determination of the Court of Appeals nothing further was done in any of these actions. After the Court of Appeals had decided the O'Brien action in favor of the City, then the plaintiffs in these sought to secure some relief from the Legislature, and, failing in that, applied in one of the actions to the Court for leave to amend the complaint so that the certificate of the engineer might be attacked as fraudulent. The Court, however, refused to allow the amendment and the plaintiffs appealed, and thereafter the moving papers show that it was practically conceded by all the parties that a recovery could not be had unless relief in some form could be obtained from the Legislature or the order refusing the amendment could be reversed.

The only consideration, therefore, for the judgment, was prospective or threatened legislation, once applied for and refused, or judicial action, once applied for and denied. That this was the consideration clearly appears from the correspondence between the Corporation Counsel and the special counsel and the Aqueduct Commissioners.

In the letter of the Corporation Counsel to the special counsel, under date of November 25, 1896, he said: "The decision already rendered in the one case which has been tried doubtless affords ample protection to the City so far as litigation is concerned, but offers no assurance against legislative attacks. Last year, as you are aware, a bill was introduced in the Legislature looking to the appointment of a commission to make awards upon these claims, and I am informed upon authority which appears to me worthy of credence that a similar attempt will be made during the forthcoming session. I am very apprehensive that either this year or some other year such a measure will be passed, and I feel that if it should our chance of complete success before a commission would, for

many and obvious reasons, be very remote * * *. As you are aware, I have always maintained the position, as well since I have been Counsel to the Corporation as when I was a member of the Aqueduct Board, that the contractors had already been paid upon their final estimates all that they were justly entitled to, and that the construction given to the contract * * * for tunnel excavation was the true legal construction, and this view has been sustained by the Court of Appeals." To this letter the special counsel, under date of December 3, 1896, replied: "We have at all times been of the opinion, in which, while occupying a place on the Board of Aqueduct Commissioners, you concurred, that in equity and justice none of the claims of the contractors which have been put in suit or upon which demands have been made are valid or should be acceded to."

And, in a letter of the special counsel to the Corporation Counsel under date of October 25, 1897, referring to the previous advice as to the advisability of a settlement, they said: "We were not influenced in any considerable degree by any opinion or belief that the claims of the contractors had any foundations whatever in law, justice or equity. Our advice was founded upon the possibility that the City might, through the chances and changes of time, lose the benefit of evidence now accessible to it, or that the Legislature might be induced, under the pressure of the contractors, into some ill-advanced measure of indulgence toward them. We regard the decision of the Court of Appeals as a final determination adverse to all the claims of the contractors, and that it would be equally available against any of such claims. * * * In giving our former adverse we assumed that there was some danger of such indulgence, notwithstanding the entire want of justice and equity in the claims. * * * It may reasonably be supposed that they selected what they supposed to be their strongest claims

for active prosecution, but we do not regard this as a sufficient assurance against legislative intervention * * *."

And, in a letter of the Corporation Counsel to the special counsel under date of November 17, 1897, he said: "So far as any strictly legal claim is concerned, its non-existence has been determined by the Court of Appeals; and, if the rule of *stare decisis* applied to the Legislature as well as the courts, there would be no reason for making any compromise at all"; and, in a letter to the Aqueduct Commissioners in the same month: "As I have repeatedly said to the members of your Board, so far as strict legal liability exists it has been authoritatively settled by the Court of Appeals that there is none such on the part of the City. The only justification for settling at all, therefore, would be that, upon the whole, it was wise for the City, as it would be wise for any other litigant, to purchase peace by the payment of a sum which, while it is considerable in itself, is very much smaller than the aggregate of the claims which have been asserted."

The property of the City cannot be used to prevent hostile legislation or to "purchase peace" by preventing the prosecution of claims which have no legal existence. I cannot conceive of a more dangerous precedent to the City than this one if the other be affirmed, as it practically puts the disposition of the property of the City in the hands of the Corporation Counsel.

The order appealed from should be reversed and the motion granted, with costs.

PATTERSON, *J.*, concurred.

APPENDIX VI.

July 5, 1898.

Hon. JOHN WHALEN,
Corporation Counsel.

SIR.—Upon assuming the office of Comptroller I found a number of claims existing in favor of the city which had been from time to time submitted by the Department of Finance to your predecessors for action, and which still remain unsettled.

The following are the most important of these :

Claim for balance due on rental of Staten Island ferries, amounting to $36,969.72.

Claim against the Manhattan Elevated Railroad Company for 5 per cent. of the gross receipts of the Ninth Avenue line for a large number of years (such receipts having formerly been credited to the fund known as the Greenwich Street Elevated Railroad Fund).

Claim against the Third Avenue Railroad Company for $10,020, for car-license fees.

Claim against John Rourke, lessee of the city property at Nos. 8 to 14 Chambers street, amounting to $1,387.50.

Please inform me what is the present status of these claims.

Very truly yours,
BIRD S. COLER,
Comptroller.

July 21, 1898.

Hon. JOHN WHALEN,
Corporation Counsel.

SIR.—On July 5, 1898, I transmitted to you a request for certain information in regard to claims appearing unpaid on the books of the Bureau of City Revenue in this Department, and which had been from time to time transmitted by the De-

partment of Finance to your predecessors for action by the Law Department.

On July 20, 1898, I received from Mr. Charles Blandy, of your office, the following letter:

LAW DEPARTMENT,

OFFICE OF THE CORPORATION COUNSEL.

NEW YORK, July 19th, 1898.

HON. BIRD S. COLER,
Comptroller.

SIR.—I beg to acknowledge the receipt of your favor of the 5th inst., enquiring as to the status of a number of claims existing in favor of the City which had been from time to time submitted by the Department of Finance to my predecessors for action, and which you say still remain unsettled.

The claims were duly received by this Department for such legal action as was proper and they are receiving and will receive the same.

If this office has occasion to require further information from your Department a communication to that effect will be sent to it, and when the litigations are terminated the Finance Department will be made aware of the fact in one or other of the many ways in which the attention of the Finance Department is usually brought to such determinations.

Respectfully yours,

CHAS. BLANDY,
Acting Corporation Counsel.

The impertinence of this reply needs no commentary.

If it is necessary that the Comptroller should give reasons for expecting answers from the Law Department to inquiries in regard to matters of official business, couched in respectful language, I have to submit for your consideration the following facts bearing upon my letter of the 5th inst.:

First.—The claims referred to have been in the hands of the Law Department for so many years that the presumption has naturally arisen that some of these claims, at least, have proved to be uncollectible. If this is so, the Department of Finance should be informed of that fact so that fictitious balances should not be carried from year to year on the books of the Bureau of City Revenue. If the claims or any of them are uncollectible, the account should either be charged off, or at least carried into a suspense account. The interests of good bookkeeping are certainly not served by the indefinite retention of these claims in the Law Department for a number of years and a refusal to furnish any information in regard to the prospects of their collection or settlement.

Secondly.—The Department of Finance is properly interested in securing the information requested, not only for the reasons above stated, but also because upon the disposition of these claims depends the conduct of the officials of the Bureau of City Revenue in collecting amounts claimed by the city to be due for years subsequent to those covered by the claims transmitted to the Law Department. This is especially true of such claims as that against the Manhattan Railroad Company, which, if collectible at all, is collectible during each current year.

Until I have knowledge to the contrary I must assume that the action of your subordinate in refusing to furnish the information requested will not meet with the approval of the head of the Law Department, and I therefore respectfully renew my request for the information asked for in my letter to you of the 5th inst.

Respectfully,

BIRD S. COLER,
Comptroller.

February 18, 1899.

Hon. JOHN WHALEN,
Corporation Counsel.

Sir.—On March 28, 1890, and on several subsequent dates in that year, the Department of Finance transmitted to the Law Department for its action, the city's claim against the Manhattan Railway Company for five per cent. of its net receipts from passenger traffic on the Ninth and Third avenue lines.

On June 5, 1894, the Court of Appeals decided the ensuing litigation in favor of the city so far as the city's claim related to the net income from said railway on its Ninth avenue line from Greenwich street up to Sixty-first street, and at one-half of five per cent. from the latter street to Eighty-third street.

In a communication dated July 19, 1898, Mr. Charles Blandy, Acting Corporation Counsel, refused to give me any information in regard to the status of this claim, and in a communication to you dated July 21, 1898, I renewed my request for such information. To this last mentioned letter I received no reply.

My object in again addressing you in regard to this matter, is to inform you that since the litigation referred to, the Mahattan Railway Company has made no payment to the city on account of this claim for percentages of its net income, and to suggest the possibility of the city's claim being barred by the Statute of Limitations in the event of the Law Department having failed to begin another action against said company for percentages accruing since the dates mentioned in the complaint in the original action.

Very truly yours,
(Signed) BIRD S. COLER,
Comptroller.

(Copy.)

LAW DEPARTMENT.

OFFICE OF THE CORPORATION COUNSEL.

NEW YORK, March 2nd, 1899.

Hon. BIRD S. COLER,
Comptroller.

SIR.—I am in receipt of your communication bearing date 18 February, stating that on March 28, 1890, and on several subsequent dates in that year, The Department of Finance transmitted to the Law Department for its action the City's claim against the Manhattan Railway Company for five per cent. of its net receipts from passenger traffic on the Ninth and Third avenue lines.

You state that on June 5, 1894, the Court of Appeals decided the ensuing litigation in favor of the City so far as the City's claim related to the net income from said railway on its Ninth avenue line from Greenwich street up to Sixty-first street and at one-half of five per cent. from the latter street to Eighty-third street.

You further state that in a communication, dated July 19, 1898, Mr. Charles Blandy, Acting Corporation Counsel refused to give you any information in regard to the status of this claim, and that in a communication to me, dated July 21, 1898 you renewed your request for such information.

You further state that your object in again addressing me in regard to the matter is to inform me that since the litigation referred to, the Manhattan Railway Company has made no payment to the City on account of its claim for percentages of its net income, and to suggest the possibility of the City's claim being barred by the Statute of Limitations in the event of this department having failed to begin another action against said company for percentage accruing since the dates mentioned in the complaint in the original action.

I take due note of your statement that the Manhattan Railway Company has not paid any percentage since the institution of the suit in question, and I will cause an examination of the situation to be made with a view of bringing a suit, or suits, to enforce the rights of the City as defined in the very unsatisfactory decision of the Court of Appeals, a decision which in the dissenting opinion of Judge Bartlett is rightly called "a very great injustice to The City of New York."

I do not imagine that you desire any detailed information as to proceedings had in this case, but wish to ascertain merely the probability of payment by the company.

I will state generally that I have made an investigation as to the condition of the action which, as you know, was brought by one of my predecessors, and I find that condition to be as follows:

The suit was in the hands of the late David J. Dean, and in its earlier stages in that of Mr. John H. Strahan, who tried the case at Special Term.

Both Mr. Strahan and Mr. Dean are dead, and their deaths make it very difficult at this time to obtain information, of which they were possessed, in reference to this case, for there are matters which do not appear of record, of considerable importance.

Upon my attention being called to the fact of the pendency of the action, an attempt was made to negotiate with the counsel to the Manhattan Railway Company, Mr. Julien T. Davies, to shorten what will be, in any event, a very prolonged trial, by agreeing upon the facts relevant to the case as left by the decision of the Court of Appeals.

If a formal second trial could be avoided, except upon stipulated facts, it would very much abbreviate the proceedings without, I think, doing injustice to either side.

Mr. Davies promised to take the voluminous

papers on appeal and to read them through, and to then see if he could agree with this office as to a method of procedure.

Since this, however, nothing has been done owing to Mr. Davies' engagements, and to the very great press of business upon this office incidental to the creation and administration of the New City.

It has so far been found impossible for any one in the office to give the necessary time to the preparation for the examination of the accounts of this road, although some effort has been made to find a competent person thoroughly acquainted with railway accounts from whom expert aid in the case could be obtained.

The situation apparently is, at this time, that the case must be retried in all its details so far as it relates to the Ninth and not the Third avenue road.

A reference will then be ordered by the Court and a new referee appointed in the place of the former referee, who is dead.

All this will be done as soon as is possible, although it is a task very much beyond what you would suppose it to be from a mere examination of the papers, and I will, as I have already said, prepare to institute such suits as may be necessary.

As to the possible loss by claims being barred by the statute of limitations, that is something for which I must decline to be held responsible, if caused by the non-action of any of my predecessors.

It is one of the penalties which the city must pay for the frequent change of its officials at the head of the departments that the knowledge of the officer is not transmitted to his successor, except as to matters which are of record in the office, and, therefore, there are many matters of importance not called to the attention of the head of a department in time to take seasonable action thereon.

I may add that I am informed that Mr. Dean regarded the decision of the Court of Appeals as a very barren victory for the city from which we would obtain but little in the way of money.

Yours,

JOHN WHALEN,
Corporation Counsel.

APPENDIX VII.

CITY OF NEW YORK.

FINANCE DEPARTMENT,

COMPTROLLER'S OFFICE.

May 25, 1899.

Hon. JOHN WHALEN,
Corporation Counsel.

Sir.—I acknowledge receipt of your letter of the 12th inst. returning the transcript of judgment against the city, for $549.49, in favor of Henrietta A. Mittnach and E. Hastings.

You state that there being no defence to this action you offered judgment, and that "the judgment was therefore properly obtained and is a legal charge against the treasury."

It seems that you must have been misinformed about this matter.

On September 8, 1898 the Commissioner of Public Buildings, Lighting and Supplies, ordered from Mittnach's Eagle Safe Co. a safe of certain specified dimensions and twelve name plates. The order does not specify any price, nor does it appear that any agreement as to price was ever entered into between the Company and the Department. In case of an excessive charge it would, therefore, be perfectly proper for the auditor to refuse to audit the bill and entirely competent for the city in case of litigation to prove the just value of the articles furnished.

The Inspector of the Auditing Bureau in the Borough of Brooklyn, who passed on this bill, reported the charge as excessive and the Auditor declined to audit the bill at any greater amount (for the safe—the name plates being only $12.00 in all) than $300.

The Department of Public Buildings, Lighting and Supplies having insisted that the price was

reasonable, I secured from an impartial expert in the safe business of more than twenty years standing, a report dated March 6, 1899, who after reporting that the casting sheet was broken and alluding to other defects reported that a fair and true valuation of this safe would be $350.

A suit having been begun, Mr. McKinny received a letter from Assistant Corporation Counsel, John J. Walsh, dated March 27, 1899, requesting information.

In reply Mr. McKinny sent a communication to Mr. Walsh, dated March 30, 1899, referring in substance to the facts on which the Department of Finance contested this claim.

The next information in regard to the matter received by my department was the receipt of the transcript of judgment.

I submit that quite apart from the controversy which has existed between our respective departments as to the right of the Corporation Counsel to settle claims against the city by offers of judgments, this cannot be regarded, in any event, as a proper case for the giving away of the City's rights. The Department of Finance maintains a corps of inspectors whose duty is largely to report on the market value of goods furnished to the city. Where no agreement as to price is entered into it is certainly competent for the city to defend on the ground that the price charged is excessive.

That this was true in this case my office stood ready to prove in Court.

To make the City's case stronger, a report of an expert was secured at considerable expense and that expert was also prepared to testify in Court.

I cannot assume that in such cases as this you propose to wholly disregard the reports of the experts connected with or employed by the auditing department of the city government, and to take for granted any claim, not on its face fraudulent, that may be presented against the city. For this reason, as I stated above, I prefer to believe that

you have been misinformed in regard to this claim, or that the facts in regard to the city's defence were not brought to your attention.

One of my objects in addressing you at length in regard to this matter is that the same claimants have presented to this office a large number of similar bills against the same Department which the Auditors have declined to audit on the same ground—that the charges are excessive—in some cases outrageously so. I have reason to believe that the mere interposition of a defense to the actions that may be brought will result in the claimants accepting in full satisfaction payments in amounts considerably less than the face of their claims. In the event of these actions going to trial, however, I have secured expert testimony which cannot, in my opinion, fail to sustain the contention of the several Auditors and Inspectors, who in thoroughly independent examinations have reached the same conclusions in regard to these claims.

Respectfully,

(Signed) Bird S. Coler,
Comptroller.

CITY OF NEW YORK

DEPARTMENT OF FINANCE

COMPTROLLER'S OFFICE.

October 23, 1899.

Hon. JOHN WHALEN,
Corporation Counsel.

SIR.—I have received your communication of the 19th inst., in regard to certain actions brought against the City of New York to recover the sums of $500.00, $450.00, $650.00, $290.00, $503.00, respectively, for safes furnished by Mittnacht's Eagle Safe Company upon orders of the Commissioner of Public Buildings, Lighting and Supplies.

You state that, in your opinion, no sufficient defense to these actions exists and that unless I furnish you, within five days, with sufficient information to enable you to defend these actions you will offer judgments for the amounts demanded.

In your letter you state that the only defense must be placed on the ground of fraud; and that, as you do not understand me to allege fraud on the part of the Commissioner of Public Buildings, Lighting and Supplies, you are aware of no defense and are not willing to subject the City to the almost inevitable imposition of costs.

Am I to understand you that the only fraud which would be available as a defense would be such fraud as resulted from a conspiracy in which the Commissioner of Public Buildings, Lighting and Supplies was a party? If so, you correctly understand me as not imputing fraud of this kind, as I have no knowledge upon which to base such an allegation and, from what I know of the character of the head of that Department, I do not believe he would be guilty of any such reprehensible conduct.

I do believe, however, that the Commissioner of

Public Buildings, Lighting and Supplies has been imposed upon by one or more of his subordinates, and that there has been fraud in this matter, of which the City of New York is to be a victim. I entertain no doubt whatever, nor do I think any reasonable man could doubt that such a state of affairs exists, after reading the evidence on file in this department.

This evidence does not, as you state in your letter, merely indicate that better safes than those furnished could be procured at lower prices; but, rather, shows that deliberate and systematic effort has been made to defraud the city.

In regard to the claim for $500.00, based on order No. 73 of the Department of Public Buildings, Lighting and Supplies, dated October 21st, 1898, the facts are that this safe was manufactured by the Diebold Safe and Lock Company of Canton, Ohio, bearing the stock number 86,223, the list price of which, on the manufacturers' catalogue, is $395.00, from which, however, according to business usage, a commission of twenty-five per cent. (25%) is paid to agents, so that, after allowing a reasonable profit to the Mittnacht Company, which simply acted as a middleman, a fair valuation would be $350.00.

In regard to the claim for $503.00, based on the requisition of the Department of Public Buildings, Lighting and Supplies, dated November 23rd, 1898, it appears that this safe was also manufactured by the Diebold Safe and Lock Company, bearing the stock number 86,171, and the same conclusions are to be reached.

In regard to the claim for $650.00, this is made up of the following items:

For one folding door Marvin safe, $150.00. This safe is second hand, and is an old style Marvin, more than forty years old, not fire proof and practically valueless.

I leave it to you to decide, as a matter of law,

whether the order of the Department (which says nothing about second hand material), has been complied with by the delivery of an antique curiosity of this kind.

The balance of this claim is based upon an order for two safes of different dimensions, lumped together, however, for the sum of $500.00.

One of these safes was manufactured by the Diebold Safe and Lock Company of Canton, Ohio, bearing the stock number 77,278 and, comparing with their published catalogue No. 36, is found to be at least ten years old and worth, at the outside, $160.00. It was second hand when delivered.

The second safe is of cheap Western manufacture, made of hoop and piece front construction, without solid angles, not fire proof nor burglar proof, and worth the value of scrap iron.

In regard to the claim for $290.00, this safe was manufactured by the Hall Safe Company of Cincinnati, Ohio, has thin walls, is not fire proof, and can readily be shown to be worth not more than $225.00 or, at the outside, $250.00.

In regard to the claim for $450.00, this is based on a safe delivered to the Department of Health in the Borough of Manhattan, on the order of the Department of Public Buildings, Lighting and Supplies, dated December 30th, 1898. I have not at hand a detailed description of this safe, but an expert report made to me orally shows the fair value thereof to be $375.00.

In the case of all these safes, except the one last mentioned, I have secured, in addition to the usual reports of my inspectors, reports by an expert of twenty years standing in the safe business.

This gentleman is perfectly willing on the witness stand to substantiate the facts already reported to me in writing, and his services are at your disposal.

It is my desire, and I respectfully request you to defend these actions on behalf of the City, and in

this connection I beg to call your attention to the following facts:

Fraud rarely proves itself; but is often made easily discoverable in the course of legal proceedings.

The facts in the possession of this Department in regard to these claims to which your attention has in part been called, are such as to lead any honestly fair-minded public officer to believe that fraud exists.

The eliciting of further evidence lies within your power; it is outside of mine.

The Comptroller's examinations taken by your office under Section 149 of the Charter in my behalf—so far as they have been brought to my attention—have been altogether inadequaete and read more like an attempt to prove the claimants' case than to elicit those elements in the case that might be favorable to the City.

I sincerely hope that, after a consideration of the facts stated above, you will see your way clear to comply with the request of the auditing branch of the City government to defend these actions; since, otherwise, I shall consider it my duty to make public what I regard as a scandalous attempt to swindle the City treasury and shall do all in my power to aid in the taxpayers' action which I have reason to believe will certainly be brought.

Very truly yours,

(Signed) BIRD S. COLER,
Comptroller.